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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Glenn)

THE PEOPLE, Plaintiff and Respondent, v. CURTIS MICHAEL WOOLDRIDGE, Defendant and Appellant.	C084530 (Super. Ct. Nos. 16NCR10906, 15SCR08658, 15SCR08500,15SCR08499, 15SCR08498, 15SCR08493, 15SCR08469, 15SCR08468)

Defendant Curtis Michael Wooldridge pleaded guilty to possession of methamphetamine while armed (Health & Saf. Code, § 11370.1, subd. (a)) and admitted an on bail or own recognizance enhancement (Pen. Code, § 12022.1)[1] in case No. 15SCR08658 (the drug case); he also pleaded guilty to various misdemeanors that are not

[1] Undesignated statutory references are to the Penal Code.

significant to his claims on this appeal. As relevant here, the trial court later placed defendant on probation in the drug case.

While he was on release pending sentencing in the drug case, defendant was charged with possession of a bomb (§ 18710, subd. (a)) and other charges in case No. 16NCR10906 (the bomb case). He later pleaded guilty in the bomb case. At defendant's sentencing on the bomb case, the trial court revoked probation in the drug case and imposed a (combined) six-year eight-month state prison sentence consisting of the upper term of four years for the drug offense, two years for the enhancement, and a consecutive eight months for the bomb case.

On appeal, defendant contends the trial court did not follow the correct procedure when it revoked probation on the drug case and that its subsequent imposition of the upper term was improper. We find any procedural error in revoking probation harmless; however, because the sole basis given for imposition of the upper term was factually incorrect, its imposition constituted an abuse of discretion. Consequentially, we vacate the sentence and remand for resentencing.

BACKGROUND

The timing (rather than the details) of defendant's crimes is most relevant to his contentions on appeal; we omit all but the relevant facts underlying his convictions and we emphasize the timing of his two cases at issue here.

On August 25, 2015, defendant was found in his Willows home with drugs, firearms, and other illicit items and contraband including a can of gun powder. He admitted selling and trading methamphetamine, making bombs, and possessing firearms. He was charged in the drug case on September 3, 2015, and pled guilty in the drug case to possession of methamphetamine while armed and to various pending misdemeanor cases on February 10, 2016.

Sentencing was set for April 22 and later continued to April 29, 2016. The probation report recommended denying probation and instead imposing a six-year prison term (the upper term of four years plus two for an on bail enhancement).

While defendant was on release *pending sentencing* in the drug case, on April 14, 2016, an explosion caused a fire in an agricultural area that contained fuel tanks. Defendant was implicated and admitted involvement in the detonation of a bomb or other device that caused the explosion. On April 18, 2016, he was charged in the bomb case.

On April 29, 2016, defendant entered not guilty pleas to the charges in the bomb case. The trial court then sentenced defendant to probation on the drug case on that same day.

Defendant pleaded guilty in the bomb case on September 21, 2016. The signed plea form included an advisement, initialed by defendant, that his conviction in the case may constitute a violation of his probation in any other case, resulting in additional punishment. During the plea colloquy, the trial court asked defendant if he understood that "if you're currently on probation or parole anywhere, that this plea could be used to revoke that parole or probation?" Defendant replied that he understood. After the trial court accepted the plea, the prosecutor stated: "Your Honor, the Defendant is on probation on several cases, just to be clear, this new felony conviction would act as a violation of probation for any of those which this Defendant is on probation." The trial court directed the probation officer to put "[w]hatever's out there" in the probation report, and set the matter for sentencing on December 2, 2016. Defense counsel did not object to or disagree with the prosecutor's statement concerning defendant's probation.

The November 21, 2016 probation report stated defendant had been found in violation of probation in the drug case due to his guilty plea in the bomb case. The report listed four aggravating circumstances in the bomb case: the crime involved a threat of great bodily harm; the crime involved planning and sophistication; defendant engaged in violent conduct; and defendant's prior convictions were numerous and of increasing

seriousness. It found one mitigating circumstance, that defendant's performance on probation was satisfactory. It recommended a six-year eight-month term for the two cases.

On December 16, 2016, the trial court granted defense counsel's request for a continuance to confer with defendant over a possible motion to withdraw his plea in the bomb case. Defendant moved to withdraw the plea on January 6, 2017, asserting he was not told before the plea about the effect on his probation status.

At a January 13, 2017 hearing, the parties and the trial court agreed that defendant's plea to the bomb offense required a mandatory state prison sentence. When defense counsel brought up that defendant was still on probation in the drug case, the court replied: "But the problem is that we can't get probation in this [bomb] case. Then the separate case will be sentenced to whatever it is. Probation would be denied because probation would serve no useful purpose then." After defense counsel replied that defendant had already been sentenced to probation, in the drug case among others, the court responded it "would go through resentencing because I'm not going to carry him on probation if he's sentenced to state prison."

Defense counsel replied, "Well, I think I understand the Court's posture on that, and I think the Court is absolutely correct. There is authority. Even though the offense didn't act as a violation of his probation, it can't be used to violate his probation. His unavailability to continue on probation could act as a basis for terminating it and resentencing him. I think there is good authority for that."

After more discussion not relevant here, the trial court informed counsel, "[a]nd if he doesn't make the motion to withdraw the plea, then I go through resentencing and it's a state prison commitment." Defense counsel and the prosecutor agreed with the court's analysis.

On January 27, 2017, defense counsel informed the court that defendant had changed his mind and decided to abandon the motion to withdraw and proceed with

sentencing. This decision was made despite the prosecutor's announcement of no opposition to withdrawal. Counsel preferred all of defendant's cases be resolved at one hearing, as there were significant credits in his other cases and it made no sense to keep him on probation in the other cases when he was going to prison on the bomb case.

At the March 3, 2017 sentencing hearing, the trial court stated it had read the probation report, and it was sentencing defendant in both (the bomb and drug) cases. The court announced that defendant had admitted violating his probation in the drug case and stated its intention to deny probation in the bomb case because defendant was statutorily ineligible. The court also would decline to reinstate probation in the drug case "because probation would no longer serve any useful purpose in this matter."

Defense counsel told the court (accurately) that defendant had *not* admitted violating probation. While noting that any finding that defendant violated probation (on the drug case) by committing the bomb offense would be improper because defendant committed the bomb offense before he was placed on probation, defense counsel nonetheless admitted, "[a]s a practical matter, he's not amenable to probation." Counsel argued that imposing the maximum term in the drug case would be fundamentally unfair, as defendant did not violate probation. Counsel noted defendant had never been on formal probation before, as these two cases were his first felony cases.

The trial court ruled in pertinent part as follows, beginning with the drug case:

"On April 7th in that case this matter was called and he was granted probation. That's April 7th, 2016. Attached to that case were numerous other cases that were alleged that he was on for a consideration of probation. . . .

"To say that he had a run of criminality would be soft-selling his circumstances. Those are outlined in the probation report describing each and every conduct [*sic*] that he had. In those cases he did not receive the maximum punishment that he could have received originally. In those cases, he was given a break because he was given less than the maximum punishment for those violations of the law. And -- And in light of that,

what happens? We go out and have a more serious violation of the law -- possession of a bomb or destructive device.

"No, I'm not awarding good conduct. For this it would be -- He was put on notice at that time when the other probations were denied and he was sentenced to the terminal sentence what would happen to him in this case if he violated probation again."

The court then imposed the six-year eight-month sentence.

DISCUSSION

I

Terminating Probation in the Drug Case

A. *Defendant's Argument*

Defendant first asserts the trial court could not terminate his probation pursuant to section 1203.2 because it did not comply with that statute's requirements for notice, summary revocation, or a hearing where he could contest the reason for revoking probation. Defendant claims that until he was sentenced to state prison on the bomb offense, there was nothing to make him unamenable to probation for the drug offense. From this, he reasons that section 1203.2a, which applies when a court is revoking probation for persons serving time in state prison on another offense, governed the termination of his probation.

Defendant claims that proper procedure required the court to *first* sentence him to state prison on the bomb case, *then* invoke section 1203.2a to terminate his probation in the drug case, *then* determine whether to impose a concurrent or consecutive term for the drug case. He argues prejudice in this procedural error, because if the bomb case were sentenced first it would necessarily be the principal term and the drug case would be subordinate. If this assumption were accurate, (which, as we explain *post*, it is not), it follows that the total sentence would be lower because the bomb charge carries a lower

penalty.[2] The bomb charge would receive the full sentence and the longer sentence, the drug charge with the enhancement, would need to be reduced by two-thirds to run consecutive to the previously imposed sentence for the bomb case.

B. *Analysis*

Section 1203.2, subdivision (a) provides that a trial court may revoke probation where the "court, in its judgment, has reason to believe from the report of the probation or parole officer or otherwise that the person has violated any of the conditions of his or her probation . . . ." That provision prescribes few procedural guidelines governing probation revocation proceedings.[3] (*People v. Arreola* (1994) 7 Cal.4th 1144, 1152.)

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[2] The punishment for possession of a controlled substance while armed is two, three, or four years (Health & Saf. Code, § 11370.1, subd. (a)); the punishment for possession of a bomb is 16 months, two, or three years. (Pen. Code, §§ 18710, subd. (a), 18, subd. (a).)

[3] Section 1203.2 currently provides in relevant part:

"(a) At any time during the period of supervision of a person (1) released on probation under the care of a probation officer . . . if any probation officer, parole officer, or peace officer has probable cause to believe that the supervised person is violating any term or condition of his or her supervision, the officer may, without warrant or other process and at any time until the final disposition of the case, rearrest the supervised person and bring him or her before the court . . . . [T]he court may order the release of a supervised person from custody under any terms and conditions the court deems appropriate. Upon rearrest, or upon the issuance of a warrant for rearrest, the court may revoke and terminate the supervision of the person if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation or parole officer or otherwise that the person has violated any of the conditions of his or her supervision, has become abandoned to improper associates or a vicious life, or has subsequently committed other offenses, regardless of whether he or she has been prosecuted for those offenses. . . .

"(b)(1) Upon its own motion or upon the petition of the supervised person, the probation or parole officer, or the district attorney, the court may modify, revoke, or terminate supervision of the person pursuant to this subdivision . . . . The court shall give notice of its motion, and the probation or parole officer or the district attorney shall give notice of his or her petition to the supervised person, his or her attorney of record, and the

The due process clause of the Fourteenth Amendment has been found to impose procedural and substantive limits on the revocation of the conditional liberty created by probation. (*Black v. Romano* (1985) 471 U.S. 606, 610; see *People v. Arreola, supra*, 7 Cal.4th at pp. 1152-1153.) It requires that a probationer be given "written notice of the claimed violations of his probation; disclosure of the evidence against him; an opportunity to be heard in person and to present witnesses and documentary evidence; a neutral hearing body; and a written statement by the factfinder as to the evidence relied on and the reasons for revoking probation. [Citation.]" (*Black*, at p. 612.)

While we agree that the trial court did not comply with the procedural requirements of section 1203.2, here any errors are either forfeited or harmless beyond a reasonable doubt. Defendant initialed the section in his plea form in the bomb case affirming his understanding that his plea could be considered to terminate any probation he was currently on; he orally affirmed the advisement at the plea colloquy. At the end of the plea hearing, the prosecutor declared that defendant's plea would be used to violate his probation; neither defendant nor counsel objected to this declaration. At the January 17, 2017 hearing, defendant was given the opportunity to withdraw his plea, but declined, stating through counsel his preference to resolve *all his cases* at sentencing on the bomb case. At the sentencing hearing, while defense counsel corrected the court's erroneous observation that defendant had *admitted* violating probation, counsel did not object to the court's terminating probation and even agreed that continuing probation was

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district attorney or the probation or parole officer, as the case may be. The supervised person shall give notice of his or her petition to the probation or parole officer and notice of any motion or petition shall be given to the district attorney in all cases. The court shall refer its motion or the petition to the probation or parole officer. After the receipt of a written report from the probation or parole officer, the court shall read and consider the report and either its motion or the petition and may modify, revoke, or terminate the supervision of the supervised person upon the grounds set forth in subdivision (a) if the interests of justice so require."

not feasible. Counsel was correct. The haphazard method of terminating probation here did not result in cognizable, prejudicial error.

We reach the same conclusion even if we accept defendant's argument that section 1203.2a applied to defendant's cases rather than section 1203.2.

Because section 1203.2a allows a defendant *already in prison* to demand to be sentenced in absentia on other cases, it does not apply to defendant's situation.[4] But the result here would be no different even if defendant were already in prison on the bomb case at the time of imposition of sentence on the drug case. Although defendant argues that had the trial court followed section 1203.2a, he necessarily would have been sentenced first on the case with the lower triad--the 2016 bomb case--and next the subsequent sentence on the higher triad--the 2015 drug case--resulting in a lower aggregate sentence, this argument ignores the requirements of section 1170.1.

With exceptions that do not apply here, section 1170.1 requires that a defendant convicted of multiple felonies "whether in the same proceeding or court or *whether in different proceedings or courts*" be sentenced subject to a specific sentencing protocol. (§ 1170.1, subd. (a), italics added.) "Section 1170.1 sets forth the sentencing protocol for felony offenses for which a determinate low, middle or upper term of incarceration is imposed. It also sets forth the rules for imposing a consecutive sentence through the designation of 'principal' and 'subordinate' terms. First, the trial court is required to select a base term—either the statutory low, middle or upper term—for each of the crimes. [Citations.] Second, if the court determines that a consecutive sentence is merited, it must designate the crime with the 'greatest' selected base term as the principal

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[4] Section 1203.2a provides in relevant part that "[i]f any defendant who has been released on probation is committed to a prison . . ., the court which released him or her on probation shall have jurisdiction to impose sentence . . . in the absence of defendant" at defendant's request.

term and the other crimes as subordinate terms. [Citation.] Third, the court sentences the defendant to the full base term it selected for the principal term crime and one-third of the middle term for any crimes for which the sentence is ordered to run consecutively. [Citations.] A subordinate term is one-third of the *middle term* even if the trial court had initially selected the lower or upper term as the base term." (*People v. Neely* (2009) 176 Cal.App.4th 787, 797-798.)

Section 1170.1 required that defendant's crimes be sentenced together regardless of the "order" of sentencing. Here, defendant was present in court and sentenced on both crimes simultaneously. Section 1170.1 controlled, and the trial court proceeded correctly. This same selection of base, principal, and subordinate terms would have occurred no matter which of defendant's crimes was sentenced "first." Under section 1170.1, they would be required to be sentenced (or resentenced) together. Thus, any procedural error was harmless.

II

Imposition of the Upper Term

Defendant next contends the imposition of the upper term for the drug offense was an abuse of discretion, arguing that the sole reason given for imposition of the upper term was factually incorrect. The Attorney General counters that the record is unclear as to the subject of the trial court's reliance, and we should presume its decision to be correct because the record reflects adequate factors in aggravation to support an upper term sentence. He adds that the error is harmless. Defendant has the better argument.

We review a trial court's decision to impose the upper term for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) An upper term may be based on "any aggravating circumstance" the court deems significant so long as it is " 'reasonably related to the decision being made.' " (*Id*. at p. 848.) A court abuses its discretion if it relies on circumstances not relevant to the decision or that "constitute an improper basis for decision." (*Id*. at p. 847.)

While there may be grounds for the trial court to exercise its discretion and impose the upper term, there is no evidence that the trial court considered any of them. The *sole reason* it gave for imposing the upper term, that defendant committed the bomb offense after being shown leniency and granted probation for the drug offense, cannot justify an upper term because it is factually incorrect. As we have outlined, defendant committed the bomb offense *before* he was placed on probation in the drug case. Because he was placed on probation in the drug case *after* he committed the bomb offense, there is no showing that he violated the terms of his probation or flaunted the lenience he was given by the initial grant of probation. This basis cannot be relied upon to justify imposing the upper term and the trial court's reliance thereon constituted an abuse of its discretion.

We reject the Attorney General's contention that this error was harmless. The trial court here gave only one reason for doing what it did, and that one reason was invalid. We must vacate the sentence and remand for resentencing.

DISPOSITION

The sentence is vacated, and the matter is remanded for resentencing. In all other respects, the judgment is affirmed.

/s/
Duarte, J.

We concur:

/s/
Raye, P. J.

/s/
Robie, J.